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In the Supreme Court of the United States

OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT, PETITIONER

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE FOR THE UNITED STATES, ACTING THROUGH THE ATTORNEY GENERAL, SUPPORTING CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Office of the President may decline to produce documents sought by a federal grand jury subpoena on the ground that the documents are protected by an attorney-client privilege.

2. Whether the Office of the President may decline to produce documents sought by a federal grand jury subpoena on the ground that they are protected by the work product doctrine because they were prepared by its attorneys in connection with grand jury proceedings and legislative proceedings.

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INTEREST OF THE UNITED STATES

Petitioner and respondent represent discrete interests of the United States in this specific litigation. The issues presented, however, implicate fundamental concerns of the United States that extend far beyond the particular circumstances of this case. Thus, although special counsel have been appointed by the Department of Justice to represent the Office of the President in this case, the United States has a broad and substantial interest in the ability of the President and Executive Branch agencies generally to obtain frank, fully informed, and confidential legal advice. And although the Independent Counsel has the "authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice" with respect to matters within his jurisdiction, 28 U.S.C. 594(a), the Attorney General is otherwise responsible for federal criminal prosecutions. See 28 U.S.C. 597(b) (authorizing Attorney General and Solicitor Gen-

eral to participate as amicus curiae in independent counsel cases).

The unique nature of this case led the Attorney General to conclude at the time this dispute arose that the White House should be represented by specially appointed counsel, who would be in a position to review the attorney notes subpoenaed by the Independent Counsel and respond to the motion to compel on that basis.[1] The Attorney General reserved, however, the right to file a brief addressing legal issues of broader interest to the United States in appropriate circumstances. The opinion of the court of appeals now presents those circumstances.[2]

STATEMENT

1. a. On July 11, 1995, First Lady Hillary Rodham Clinton met with David Kendall, an attorney representing both the President and Mrs. Clinton in their personal capacities, at the White House Residence for the purpose of obtaining legal advice. Late in the meeting, two attorneys from the White House Counsel's Office, Jane Sherburne and Miriam Nemetz, joined them. Ms. Nemetz took some notes during the meeting. The subject of that part of the meeting was Mrs. Clinton's activities in the period immediately following the suicide of White House Deputy Counsel Vincent Foster in 1993. At the time of the meeting, investigations relating to what has become known as "Whitewater," including the handling of documents in the aftermath of the Foster suicide, were being conducted by the Independent Counsel, the Senate Whitewater Committee, the House Banking and Government Reform Committees, the Federal Deposit Insurance Corporation, and the Resolution Trust Corporation.

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[1] The Department of Justice has not reviewed the notes and is not aware of their contents.

[2] The district court opinion, and all proceedings in both lower courts, were subject to a seal order, and prior to this stage we did not review them.

The Independent Counsel had scheduled a deposition of Mrs. Clinton regarding the Foster document matter for July 22, 1995. Pet. App. 88a-89a, 94a.

b. Early in January 1996, a White House employee found in the White House Residence a copy of billing records relating to work performed by members of the Rose Law Firm, including Mrs. Clinton. Those records were responsive to a May 1994 grand jury subpoena to Mrs. Clinton. On January 19, 1996, the Independent Counsel issued a subpoena for Mrs. Clinton to testify before a Washington, D.C., grand jury regarding the discovery of the billing records. Other investigations regarding the discovery of the records were being undertaken by the Senate Whitewater Committee and other federal agencies. Mrs. Clinton testified before the grand jury on January 26, 1996. During breaks in her testimony, Mrs. Clinton met in a private room in the courthouse with Kendall, his partner Nicole Seligman, White House Counsel John Quinn, and Sherburne. After the testimony was completed, Mrs. Clinton met at the White House Residence with Sherburne, Kendall, and Seligman. Sherburne took notes during those meetings. Pet. App. 66a n.3, 89a-90a, 94a.

2. On June 21, 1996, on the application of the Independent Counsel, a grand jury in the Eastern District of Arkansas issued a subpoena to "The White House c/o Jane Sherburne, Special Counsel to the President." The subpoena sought, inter alia (Resp. C.A. App. 2-3):

> All documents created during any meeting attended by any attorney from the Office of the Counsel to the President and Hillary Rodham Clinton (regardless whether any other person was present), between July 20, 1993, and the present, which relate in any way to the death of Vincent W. Foster, Jr., documents in the office of Vincent W. Foster, Jr., at the time of his death, or events between July 20 and July 27, 1993.

The White House Counsel identified nine sets of notes that were responsive to the subpoena, but refused to produce them on the ground of attorney-client privilege and the work product doctrine. The Independent Counsel then moved to compel production, but only of the Nemetz notes of the July 11, 1995, meeting, and the Sherburne notes of the January 26, 1996, meetings. Pet. App. 2a-3a.

3. On November 26, 1996, the district court denied the Independent Counsel's motion to compel production. Pet. App. 62a-83a. The court concluded that the law in this area is "uncertain," that "Mrs. Clinton, as the functional equivalent of an officer or employee of the White House, considered her communications with lawyers from the White House Counsel's Office and personal counsel, as did those lawyers, to be confidential and for the purpose of receiving legal advice," and that the attorney-client privilege should protect the conversations for that reason—regardless of whether the privilege legally applies. *Id.* at 80a. The court also held that the notes are "work product of the type that is clearly protected from disclosure to the grand jury." *Id.* at 81a.

4. a. A divided panel of the Eighth Circuit reversed. Pet. App. 1a-61a. The majority reasoned that the principal question in this case—"whether an entity of the federal government may use the attorney-client privilege to avoid complying with a subpoena by a federal grand jury," Pet. App. 5a—is governed by Rule 501 of the Federal Rules of Evidence. That Rule provides that "the privilege of a witness, person, government, State, or political subdivision thereof [is] governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." In the majority's view, *United States* v. *Nixon*, 418 U.S. 683 (1974), "is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." Pet. App. 15a. In the

context of attorney-client communications, the court held, the governmental interest in confidentiality can never overcome a grand jury subpoena. See *id.* at 17a-20a.

The court rejected the argument that the governmental attorney-client privilege is supported by the same rationale—and should have the same scope—as the corporate attorney-client privilege recognized by this Court in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981). The court believed that White House lawyers require confidentiality less than their corporate counterparts because "the actions of White House personnel, whatever their capacity, cannot expose the White House as an entity to criminal liability," and the White House therefore does not have a compelling interest in ferreting out misconduct by its employees. Pet. App. 17a. In addition, the court found it "significant that executive branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General" pursuant to 28 U.S.C. 535(b). *Ibid.* Finally, drawing an analogy between the responsibilities of government lawyers and the responsibilities of auditors to "maintain total independence from the client at all times" and to assume "public obligations" as a "public watchdog," *id.* at 17a-18a (quoting *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984)), the court concluded that the "strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials," *id.* at 18a.[3]

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[3] The court rejected the argument that the presence of Mrs. Clinton's private attorneys "affects the calculus in this case," Pet. App. 20a, finding no "common interest" sufficient to render the private and public representations jointly privileged, *id.* at 21a-23a. And the court rejected the district court's reasoning that Mrs. Clinton's subjective belief

The court also rejected application of the work product doctrine, because it believed that White House Counsel was not "preparing for or anticipating some sort of adversarial proceeding involving his or her client." Pet. App. 25a-26a. It found "unpersuasive" the White House's position that its lawyers were preparing for the Independent Counsel's investigation, because the "OIC is not investigating the White House, nor could it do so." *Id.* at 26a. Nor, in the court's view, did congressional investigations trigger the work product doctrine, because they were directed not at the White House, but at individuals, and could result only in "political"—not legal—harm. *Id.* at 26a-27a.

b. District Judge Kopf dissented. Pet. App. 29a-61a. He believed that recognition of the attorney-client privilege in this setting falls squarely within proposed Federal Rule of Evidence 503, as well as other authoritative sources. See *id.* at 33a-38a. In his view, the fact that this is a criminal proceeding has no bearing on the application *vel non* of the attorney-client privilege, *id.* at 36a, and the public interest favors recognition of a privilege so that governmental entities may obtain legal advice about how to obey the law, *id.* at 37a-44a. Judge Kopf concluded, however, that although the ordinary prerequisites of the privilege were satisfied, see *id.* at 44a-49a, it generally can be invaded in the unique setting of a subpoena issued in connection with an independent counsel investigation on a showing of need and with appropriate procedural protections, *id.* at 51a-55a. In this case, Judge Kopf reasoned that producing the notes would unjustifiably invade Mrs. Clinton's personal attorney-client privilege, because both she and the White House Counsel reasonably expected the communications to be confidential. *Id.* at 59a-61a.

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that a privilege attached to the conversations in question was sufficient by itself to warrant refusing to enforce the subpoena. *Id.* at 23a-25a.

DISCUSSION

The United States is ordinarily entitled to the same attorney-client privilege that is available to private individuals and corporations. This case, however, does not arise from the ordinary situation in which the privilege is asserted by its holder against an outside entity. This case involves claims to information by prosecutorial interests of the United States represented by the Independent Counsel, on the one hand, and assertion of the attorney-client privilege for the same information by the Office of the President, on the other. The grand jury, working in conjunction with the Independent Counsel, has issued a subpoena and, through the Independent Counsel, has sought judicial enforcement of it. The primary position of the Office of the President is that the attorney-client privilege is absolute and therefore necessarily prevails against the grand jury subpoena. The position of the Independent Counsel and the court of appeals, by contrast, is that there is no attorney-client privilege in this setting and that the grand jury subpoena therefore necessarily prevails.

We see the matter from a different perspective. A purely intra-Executive Branch disagreement over the availability and use in court of information held by a federal agency would typically be resolved within the Executive Branch based on consideration of the various interests of the United States as a whole. In that setting, the Attorney General, who is charged with conducting litigation on behalf of the United States and its agencies, is in a position to reconcile all litigation and non-litigation interests and to speak for the single client (the United States) in all of its aspects—to assert or waive in litigation privileges that might otherwise be absolute as against parties outside the Executive Branch. Although in criminal cases the government's investigative and prosecutorial interests have great weight, there may be cases in which those interests are attenuated or are outweighed by the need for confidentiality.

Because this case involves a grand jury subpoena issued at the behest of an independent counsel—who is vested with responsibility for only one discrete interest of the United States and who does not operate under the direct supervision of the President or the Attorney General—there is no opportunity for the weighing of all relevant interests of the United States within the Executive Branch. That task thus necessarily falls to the district court in ruling on the Independent Counsel's motion to enforce the grand jury subpoena. In applying the law of privileges under Rule 501 in that setting, the President's interest in confidentiality supports application of the attorney-client privilege. The demands of criminal law enforcement, however, may require in a particular instance that the privilege give way. Cf. *United States* v. *Nixon*, 418 U.S. 683 (1974).

In holding that the privilege automatically gives way in response to an otherwise valid grand jury subpoena, the court of appeals' decision lays open the White House Counsel (and by extension federal agency counsel) to an ever-present potential for unrestrained intrusion into their ongoing attorney-client communications. That result would impair the ability of the President (and the heads of federal agencies) to obtain frank, fully informed, and confidential legal advice. The same is true of the court of appeals' categorical refusal to afford any protection through the work product doctrine. In light of the court of appeals' legal errors and the resulting practical consequences, review by this Court is warranted.

1. The attorney-client privilege "functions to protect communications between government attorneys and client agencies or departments * * * much as it operates to protect attorney-client communications in the private sector." Memorandum for the Attorney General re: Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. O.L.C. 481, 495

(1982) (1982 OLC Opinion).[4] The rationale for the governmental privilege is much the same as that for the corporate privilege recognized in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981). To paraphrase the Court's reasoning in *Upjohn*:

> In light of the vast and complicated array of regulatory legislation confronting [federal agencies], [agencies], like most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter.

Id. at 392 (citations and internal quotation marks omitted). The purpose of the privilege in the governmental context, as in the private context, is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* at 389.

All of the authoritative sources agree with that proposition—and none recognizes any categorical exception to the privilege in criminal proceedings. The proposed Federal Rules of Evidence, whose status as a solid indication of the scope of the "common law" of privilege under Rule 501 has frequently been recognized, see, *e.g.*, *United States* v. *Gillock*, 445 U.S. 360, 367-368 (1980), included a rule regarding the attorney-client privilege. That rule defined "client" to include "a person, *public officer*, or corporation, association, or other organization or entity, *either public or private*." *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 235 (1972) (emphasis added). Similarly, the Restatement (Third) of

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[4] See also 6 Op. O.L.C. at 483 ("[T]he Attorney General may assert the common-law privilege for attorney-client communications, which has been codified in Rule 501 of the Federal Rules of Evidence * * *, to protect from disclosure in litigation certain confidential communications of a legal advisory nature which were prepared for the Office of the President.").

the Law Governing Lawyers § 124, Proposed Final Draft No. 1 (approved May 28, 1996) (Restatement), states that "[t]he attorney-client privilege extends to a communication of a governmental organization," and Uniform Rule of Evidence 502(a)(1) defines "client" to include governmental bodies.[5] The attorney-client privilege of federal agencies in particular (along with the work product doctrine) has been recognized and affirmed under the Freedom of Information Act.[6]

The court of appeals' rejection of any attorney-client privilege in this setting rested on two fundamentally erroneous propositions: (1) that the White House is less in need of confidential legal advice than a corporation because the White House as an entity has no exposure to legal liability and has no compelling interest in conducting investigations to ferret out misconduct by its employees, Pet. App. 17a; and (2) that White House Counsel and other government attorneys are properly analogized to outside auditors who serve as "public watchdogs" and must "maintain total independence from the client at all times," *id.* at 17a-18a.

Contrary to the court of appeals' view, attorneys in the government, like their counterparts elsewhere, have du-

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[5] Uniform Rule 502(d)(6) limits application of the privilege in the governmental context to situations involving a pending investigation or litigation and requires a finding by the court that disclosure will "seriously impair" the agency's pursuit of the investigation or litigation. As the court of appeals recognized (Pet. App. 8a n.5), many States that have adopted the Uniform Rules have omitted this qualification.

[6] FOIA Exemption 5, 5 U.S.C. 552(b)(5), protects from disclosure materials that would normally be privileged from discovery in litigation with the agency. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In *Sears, Roebuck*, this Court found it "clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 and that such a privilege had been recognized in the civil discovery context by the prior case law." *Id.* at 154. The lower courts have routinely held that Exemption 5 applies as well to attorney-client privileged materials. See, *e.g.*, *Mead Data Cent., Inc.* v. *United States Dep't of Air Force*, 566 F.2d 242, 252-253 & n.20 (D.C. Cir. 1977); Pet. 18 n.5 (citing cases).

ties of loyalty and confidentiality to their client (see ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 97-405 (Apr. 19, 1997), slip op. 4-5; Restatement § 156 cmt. d), and a governmental client plainly does have a compelling interest in investigating allegations of wrongdoing by its employees. Moreover, the need of the President and other Executive Branch officials to obtain frank, fully informed, and confidential legal advice so that they may conform their conduct to the law is at least as great as that of non-governmental clients. Thus, where a governmental attorney-client communication satisfies the ordinary prerequisites of the privilege, the communication is privileged from disclosure to outsiders to the same extent—and for the same reasons—as a corporate attorney-client communication would be.

2. a. The fact that the federal government enjoys an absolute attorney-client privilege as against outside parties does not, however, resolve this case. It is necessary to consider as well how decisions are made within the Executive Branch whether to assert or waive privileges in litigation, including in grand jury investigations. If an agency possesses information protected by the attorney-client privilege, no abrogation or waiver of that privilege would result from furnishing the information to the Attorney General, who represents the interests of the United States as a whole, including its constituent agencies. See 28 U.S.C. 511, 512, 516, 533, 547. The only question at that stage would be whether the need for the information outweighs any adverse impact on the effective provision of legal advice to the agency possessing the information that might result from the intra-Branch disclosure.[7] If information is obtained by the Attorney Gen-

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[7] The same principles would apply within a private corporation with respect to information protected by the attorney-client privilege under *Upjohn*. No waiver of the privilege would result if counsel in one division of the corporation furnished the privileged information to counsel in another division, or to the general counsel of the corporation

eral, a further question may later arise about whether to use the information in criminal or civil litigation. Although the Attorney General's weighing of the relevant interests informing that decision would ordinarily occur in consultation with the agency involved, the agency could, if necessary, present any irreconcilable differences to the President.[8]

Where the Attorney General seeks information directly relating to the commission of a federal crime, the Justice Department's experience indicates that it would be rare for the Attorney General to strike the balance against obtaining it, given the compelling federal interest in investigation and prosecution of federal crimes.[9] The Attorney General may obtain or review the information with the understanding that there would be further consultation with the agency concerned before the material would be used in a manner that would abrogate the attorney-client (or other) privilege. After obtaining the information, there may often be situations in which the Attorney General, after again weighing the relevant considerations, would in turn choose to submit evidence protected by the governmental attorney-client privilege to a grand jury, or to introduce it into evidence at trial.[10] But

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as a whole. Whether to share the information in that manner would be a matter of internal policy to be resolved by the responsible decisionmakers within the corporation, taking into account the various interests of the corporation.

[8] Both parties agree. See Pet. 20 n.6 ("any such intrabranch disputes would ordinarily * * * be resolved by consultation between agency heads or, if necessary, by the chief executive"); Br. in Opp. 25 (discussing "internal negotiation process within the Executive Branch").

[9] That understanding is consistent with the Independent Counsel's description of the facts of this case, in which the White House has produced "numerous sets of notes taken by White House attorneys in interviews of current and former White House employees." Resp. C.A. App. 18 (Declaration of John D. Bates).

[10] A similar balancing of interests takes place within the Executive Branch in deciding under the Classified Information Procedures Act, 18 U.S.C. App. III, whether classified information will be used or disclosed in a criminal prosecution.

there may also be situations in which the potential chilling of the effective provision of legal advice to the agency concerned would outweigh the prosecution's need to use particular information—*e.g.*, where the information bore less directly on the investigation or trial, or where the information sought reflects, not the historical matters under investigation, but rather the agency's consideration of the request for information itself. What is significant is that, in the ordinary case, the Attorney General, in consultation with other Executive Branch officials and subject to the ultimate authority of the President, would weigh all of the relevant interests of the single client, the United States.

b. When a grand jury, at the behest of an independent counsel, seeks information from an Executive Branch agency, the balancing process described above cannot fully function. Neither the President nor any other Executive Branch official is in a position to determine the extent of the independent counsel's need for the information. Those officials cannot realistically require the independent counsel to reveal the precise status of his investigation, and the very purpose of the independent counsel statute is to preclude Executive Branch officials from exercising operational control over the independent counsel's investigation. By the same token, the independent counsel, who exercises only the "investigative and prosecutorial functions and powers of the Department of Justice and the Attorney General" in a particular defined matter, 28 U.S.C. 594(a), has no institutional competence or authority to balance the prosecutorial need for the information against the potential threat to the ability of the President or other high official effectively to obtain legal advice.[11] In short, no single official

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[11] The independent counsel statute authorizes an independent counsel to "determin[e] whether to contest the assertion of any testimonial privilege," 28 U.S.C. 594(a)(5), but it does not authorize an independent counsel to decide whether a privilege will be asserted or waived by the United States in the first instance.

is in a position to weigh all relevant considerations and speak for the United States as a whole in this situation.

Under these circumstances, a district court, in ruling on an independent counsel's motion to compel production, must resolve the dispute over the availability and use of the information. In so doing, a district court should be mindful that the governmental attorney-client privilege is absolute as against outside parties; the court should be mindful as well of the respective statutory interests and roles of the agency concerned, the Attorney General, and the independent counsel, and the constitutional office and responsibilities of the President.[12] Those considerations are fully accommodated by Rule 501 of the Federal Rules of Evidence, which states that "[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress * * * , the privilege of a * * * government * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

We submit that against the backdrop of the governing constitutional and statutory framework, "reason and experience" suggest that the district court should, in ruling on the motion to compel, accommodate the competing interests at stake in a manner similar to the accommodation that takes place in an ordinary, non-independent-counsel context.[13] Such an approach would not unsettle

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[12] Our position is consistent with the Restatement, § 124 cmt. b, which provides:

> More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.

[13] For example, if a government attorney learned that an official had destroyed subpoenaed documents or paid off a potential witness, see Br. in Opp. 20, the privilege should surely yield. In contrast, if a subpoena sought otherwise readily available factual material, which is

the legitimate expectations of agency officials and counsel, because it would resemble the treatment within the Executive Branch of confidential communications potentially relevant to a criminal investigation or trial. Nor would this approach hamper the investigation and prosecution of crimes, since enforcement activities outside the independent counsel setting would be governed by similar considerations.

Neither court below attempted the accommodation of interests that we believe is required, and at this stage we therefore do not address what the precise standard of review should be. A useful analogy, however, can be drawn to the resolution of assertions of executive privilege. See *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 447 (1977) (*United States* v. *Nixon* held that "in the case of the general privilege of confidentiality of Presidential communications, its importance must be balanced against the inroads of the privilege upon the effective functioning of the Judicial Branch").

In this respect, the court of appeals erred in stating that the *Nixon* test would not be satisfied unless the subpoenaed party could show "that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." Pet. App. 13a n.9 (quoting *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991)); cf. *United States* v. *North*, 910 F.2d 843, 952 (Silberman, J., concurring in part and dissenting in part), opinion withdrawn and superseded in part on other grounds on reh'g, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S.. 941 (1991). That is the standard that *any* grand jury subpoena must satisfy, even when no privilege is claimed. That standard therefore is inconsistent with this Court's direction that a district court must "treat the subpoenaed material [for which executive privilege is asserted] as presumptively privi-

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embedded in a legal analysis provided by an attorney to an agency head, the privilege should ordinarily prevail.

leged," *United States* v. *Nixon*, 418 U.S. at 713, and must require, as a prerequisite to disclosure, that the prosecutor demonstrate that the subpoenaed material is "essential to the justice of the [pending criminal] case," *ibid.* (quoting *United States* v. *Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807) (No. 14,694) (Marshall, J.)). See also *ibid.* ("privilege must yield to the demonstrated, specific need for evidence"); *Nixon* v. *Sirica*, 487 F.2d 700, 717-719 (D.C. Cir. 1973) (en banc; per curiam) (applying need standard in grand jury setting to claim of executive privilege). As in other settings, a district court may have to receive information from the parties *ex parte* and review the materials *in camera* in order to determine whether disclosure should be ordered.[14]

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[14] Respondent argues (Br. in Opp. 24-25 & n.30) that "[t]his Court has consistently rebuffed efforts to require" the sort of accommodation approach we propose. It is true that the Court has rejected such an approach as an ordinary feature of the enforcement of grand jury subpoenas, in cases in which no privilege has been asserted. See *R. Enterprises*, 498 U.S. at 298. But such tests are routinely used in connection with certain types of privilege claims, most notably the work product doctrine. See, *e.g.*, *Hickman* v. *Taylor*, 329 U.S. 495, 511-512 (1947) ("[A] burden rests on the one who would invade th[e] privacy [of an attorney's course of preparation] to establish adequate reasons to justify production through a subpoena or court order."); Fed. R. Civ. P. 26(b)(3) (requiring a showing that "the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means"). Other courts have applied the work product test in the context of criminal grand jury proceedings. See, *e.g.*, *In re John Doe*, 662 F.2d 1073, 1078 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); *In re Grand Jury Investigation*, 599 F.2d 1224, 1228-1232 (3d Cir. 1979); *In re Grand Jury Subpoena*, 599 F.2d 504, 512-513 (2d Cir. 1979); *In re Grand Jury Proceedings*, 473 F.2d 840, 842-849 (8th Cir. 1973). See also *Roviaro* v. *United States*, 353 U.S. 53, 62 (1957) (informer privilege); *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1520 (11th Cir.) (privilege for confidential communications among judges and their staffs), cert. denied, 477 U.S. 904 (1986); *King* v. *Conde*, 121 F.R.D. 180, 190-195 (E.D.N.Y. 1988) ("governmental privilege" for confidential police materials); *Kelly* v. *City of San Jose*, 114 F.R.D. 653, 660-671 (N.D. Cal. 1987) (same); *Hartman* v. *Remington Arms Co.*, 143 F.R.D. 673, 675

c. Respondent argues (Br. in Opp. 11-16) that 28 U.S.C. 535(b) is inconsistent with the assertion of a privilege in the context of this case. Section 535(b) provides that "[a]ny information * * * received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees" must be reported to the Attorney General, subject to certain exceptions. It was enacted to settle a dispute within the government by providing that the Department of Justice has general responsibility to investigate possible criminal wrongdoing, regardless of where in the government such wrongdoing comes to light. See H.R. Rep. No. 2622, 83d Cong., 2d Sess. 1, 2 (1954).

It is uncertain whether Section 535(b) applies of its own force to the Office of the President, compare *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992) (President not an "agency" for purposes of Administrative Procedure Act), and that Section (which applies only to violations of Title 18 and only those by federal employees) does not in any event cover the full range of situations in which a federal agency may come into possession of evidence of a federal crime. We assume, however, that the President (and other Executive officials) would nevertheless recognize an equivalent duty to report to the Attorney General information received by the White House (or a federal agency) concerning federal criminal violations. Any such reporting could have no effect on the ability of the government to assert an attorney-client privilege, however, since the officer to whom the information must be reported—the Attorney General—is herself the lawyer for the Executive Branch. Indeed, it is the Attorney General who ordinarily is responsible for deciding (after weighing the relevant considerations) whether to assert or waive the governmental attorney-client privilege in litigation. Thus, a duty to report in-

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(W.D. Mo. 1992) (trade secrets privilege); *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1185 (D.S.C. 1974) (same).

formation concerning criminal violations to the Attorney General is entirely consistent with the approach we propose.

3. The work product doctrine also provides qualified protection in the context of this case. See *United States* v. *Nobles*, 422 U.S. 225, 239 (1975) (work product doctrine applicable in criminal cases); *Hickman* v. *Taylor*, 329 U.S. 495 (1947); *United States* v. *Davis*, 636 F.2d 1028, 1039 n.10 (5th Cir.) ("[I]t is uniformly held that the work product doctrine applies to grand jury proceedings.") (collecting cases), cert. denied, 454 U.S. 862 (1981). The court of appeals rejected that conclusion only because it believed that the materials at issue were not prepared "in anticipation of litigation." See Pet. App. 25a-26a. That view is mistaken.

Where the subpoenaed governmental entity has a legitimate interest in evaluating the assertion of applicable privileges in response to the subpoena, with the resultant potential for litigation, the attorney's work product may have been created "in anticipation of litigation" and thus be within the scope of the work product doctrine. In this case, one of Ms. Sherburne's roles at the time of the grand jury investigation was to "advise[] and assist[] the Office of the President in determining whether any privileges or other confidentiality interests should be asserted with regard to any of the information requested" and to "negotiate[] with the [Independent Counsel] * * * to accommodate interests in privileged material." Pet. App. 85a-86a.

In addition, the White House has represented that the notes at issue here were prepared, at least in part, in order to "facilitate[] advice to the Office of the President regarding responses to congressional inquiries." Pet. App. 90a; accord *id.* at 88a. The work product doctrine applies when a congressional committee is investigating matters within the Executive Branch, because the agency has a strong interest in assuring that the work of its counsel in assisting agency officials to respond to the

investigation will not be subject to mandatory disclosure—either to the committee or to third parties in subsequent litigation. See Restatement § 136 cmt. h (litigation "includes a proceeding such as * * * an investigative legislative hearing"). The Attorney General and the Office of Legal Counsel have consistently taken the position that work product (like attorney-client communication) is protected in this setting. See Letter from the Attorney General to the President 2 (May 23, 1996) (citing Response to Congressional Requests for Information Regarding Decisions Made Under Independent Counsel Statute, 10 Op. O.L.C. 68, 78 & n.17 (1986); 1982 OLC Opinion, 6 Op. O.L.C. at 490 n.17, 494 & n.24).[15]

4. For the foregoing reasons, the court of appeals erred in holding that neither the attorney-client privilege nor the work product doctrine provides any protection at all to the subpoenaed notes. Those holdings have sufficiently important consequences to warrant review by this Court.

The court's holding unduly diminishes the ability of the President and other high-ranking Executive Branch officials to obtain legal advice and act accordingly re-

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[15] Respondent argues (Br. in Opp. 27) that the enforcement of the subpoena in this case was called for in any event "because the official meetings in question occurred in the presence of third parties—namely, Mrs. Clinton's personal attorneys." We disagree. There are important governmental interests in ensuring that agency counsel will be able to interview agency personnel as part of internal investigations, yet those officials may be unwilling to participate if the agency were forced to exclude their private counsel altogether in order to ensure that the investigation would be privileged. Thus, although the presence of Mrs. Clinton's private counsel does not prevent the government from waiving its privileges in the future, it did not result in an *automatic* abrogation of all protection for the information.

Respondent also maintains (Br. in Opp. 26-27) that no valid privilege can be asserted in this case because Mrs. Clinton "is not a representative of the [White House] client under *Upjohn*." The district court correctly rejected that conclusion, see Pet. App. 70a-72a, and the court of appeals did not disagree with that aspect of the district court's decision.

garding matters that have—or that may come to have—some relevance in an independent counsel investigation (and parallel congressional inquiries). The United States has compelling interests in investigating and prosecuting crimes—inside or outside the government—and the Justice Department's performance of those tasks is aided by the duty of the President and other government officials to report evidence of criminal violations to the Attorney General. At the same time, the Constitution requires the President to adhere to and follow the law, both in his oath of office (Art. II, § 1, Cl. 8), and in the requirement that "he shall take Care that the Laws be faithfully executed" (Art. II, § 3). To fulfill those responsibilities, the President must have access to legal advice that is frank, fully informed, and confidential.

The court of appeals' categorical holding will have the practical effect of diminishing the ability of the President and Executive Branch agencies to obtain such advice, for it denies any protection for attorney work product and attorney-client communications that may be swept within the broad ambit of a grand jury subpoena in this or a future independent counsel investigation. Because a grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not," *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950), the court of appeals' decision threatens to have a significant chilling effect for counsel and officials in the White House and federal agencies, who would be required to operate under an ever-present potential for unrestrained examination into and disclosure of their ongoing attorney-client communications. That consequence is not necessary for effective criminal law enforcement. Such an impairment of the President's ability to obtain confidential legal advice—and to provide for the availability of legal advice for the Cabinet Officers on whom he relies in executing the laws—should not be left unreviewed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1997

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* Acting Solicitor General Walter Dellinger has recused himself in this case.